

gence on his part."³⁶ This doctrine seems to have been very generally accepted and adopted.³⁷ In Mississippi, the court say pithily: "Whatever is sufficient to put a party upon inquiry amounts in equity to notice."³⁸ Whether the subsequent purchaser has made due inquiry is a question of fact for the jury; and with a view to its determination, the information obtained by him may be proved, though it can not be used to bear upon the question whether or not there was such a deed.³⁹

WM. L. MURFREE, JR.

St. Louis, Mo.

³⁶ Citing and reviewing *Rogers v. Jones*, 8 N. H. 264; *Flagg v. Mann*, 2 Sumn. 554; *Hanbury v. Litchfield*, 2 Myl. & K. 629; *Jones v. Smith*, 1 Hare, 43; *Tuttle v. Jackson*, 6 Wend. 213; *Jackson v. Post*, 15 Wend. 588; *Grimstone v. Carter*, 3 Paige, 421; *Whitbread v. Boulnois*, 1 Yon. & Coll. Ex. 303; *Jolland v. Stainbridge*, 3 Ves. Jr. 578; *Hine v. Dodd*, 2 Atk. 275; *Jackson v. Valkenburg*, 8 Cow. 260; *Dey v. Dunham*, 2 Johns. Ch. 182.

³⁷ *Hankinson v. Barbour*, 29 Ill. 80; *Heaton v. Prather*, 84 Ill. 330; *Parks v. Willard*, 1 Tex. 350; *Parker v. Cane*, 4 Wis. 1; *Gress v. Evans*, 1 Dak. Ter. 387.

³⁸ *Harper v. Reno*, 1 Freem. Ch. 336.

³⁹ *Nute v. Nute*, 41 N. H. 60.

PROOF OF FOREIGN LAW.

It is to be observed, in the first place, that the courts will take judicial notice of: 1. The law of nations.¹ 2. The law merchant.² 3. The maritime law, so far at least as recognized by the law of nations.³ 4. The ecclesiastical law, for the purpose of determining how far it is a part of the common law.⁴ 5. The courts of a State which has been carved out of another State, take judicial notice of the statutes of the latter State, passed prior to the separation.⁵ In accordance with this principle, the Supreme Court of the United States has taken judicial notice of the Spanish laws prevailing in Lou-

isiana before the cession of that territory to this government, and upon which laws titles to land in that State depended.⁶ And, in a more recent case, in a circuit court of the United States, the title to lands in Texas being involved, the question having arisen whether the laws of Tamaulipas, in whose limits the premises in question formerly lay, must be proven or could be judicially noticed, it was held by Mr. Justice Bradley, that judicial notice would be taken of them, on the ground that the former laws of a country still affecting its landed estates are to be regarded as domestic and not foreign laws.⁷

6. All courts take judicial notice of their domestic law.⁸ And the common law of a State which had no political existence before the Revolution, is the common law as modified and amended by English statutes passed prior to the Revolution.⁹ But it is held that, in those States whose colonies were established before the Revolution, with a power to legislate for themselves, English statutes passed after the colonies were thus established, but prior to the Revolution, are not a part of their common law. 7. The State courts take judicial notice of the Federal Constitution, and of its amendments,¹¹ as well as of Federal statutes.¹² 8. The Federal courts take judicial notice of the laws of the several States composing the national government.¹³ "It can never be maintained in the courts of the United States," said Mr. Chief-Justice Taney, "that the laws of any State of this Union are to be treated as the laws of a foreign na-

⁶ *United States v. Turner*, 11 How. 663, 668.

⁷ *City of Brownsville v. Cavazos*, 2 Woods, 293.

⁸ *State v. Jarrett*, 17 Md. 309; *State v. O'Conner*, 13 La. Ann. 486; *Pierson v. Baird*, 2 Greene (Iowa), 235; *Berliner v. Waterloo*, 14 Wis. 378; *Springfield v. Worcester*, 2 Cush. (Mass.) 52; *Division of Howard County*, 15 Kan. 194; *Dolph v. Barney*, 5 Oregon, 191.

⁹ *Coburn v. Harvey*, 18 Wis. 147; *Dutcher v. Culver*, 24 Minn. 584.

¹⁰ *Sackett v. Sackett*, 8 Pick. 398, 816; *Commonwealth v. Knowlton*, 2 Mass. 534.

¹¹ *Graves v. Keaton*, 3 Coldw. (43 Tenn.) 8.

¹² *Kessel v. Albetis*, 56 Barb. 362; *Papin v. Ryan*, 32 Mo. 21; *Morris v. Davidson*, 49 Ga. 361; *Rice's Succession*, 21 La. Ann. 614, 616; *Bayley v. Chubb*, 16 Gratt. 284; *Mims v. Swartz*, 37 Tex. 13; *Jones v. Laney*, 2 Tex. 342; *Semple v. Hagar*, 27 Cal. 163; *United States v. DeCoursey*, 1 Pinn. 508; *Montgomery v. Deeley*, 3 Wis. 709, 712.

¹³ *Junction Railroad Co. v. Bank of Ashland*, 12 Wall. 226, 229; *Bennett v. Bennett*, *Deady*, 299, 311; *Merrill v. Dawson*, *Hemp*, 563; *Smith v. Talapoosa Co.*, 2 Woods, 574, 576.

¹ *The Scotia*, 14 Wall. 171, 188.

² *Edie v. East India Co.*, 2 Burr. 1226; *Jewell v. Center*, 25 Ala. 498; *Bradford v. Cooper*, 1 La. Ann. 325; *Goldsmith v. Sawyer*, 46 Cal. 209.

³ *Chandler v. Grieves*, 2 H. Bl. 606n; *Maddox v. Fisher*, 14 Moore, P. C. 103; *Zugasti v. Lamer*, 12 Moore P. C. 331; *The Scotia*, 14 Wall. 171, 188; *Taylor on Ev.*, sec. 5; *Wharton on Ev.*, sec. 208.

⁴ *Sims v. Marryatt*, 17 Q. B. (79 E. C. L.) 292; *Roll. Abr.* 526; 6 Vin. Abr. 496.

⁵ *Delano v. Jopling*, 1 Litt. (Ky.) 417; *Stokes v. Macker*, 62 Barb. (N. Y.) 145; *Doe v. Eslava*, 11 Ala. 1028; *Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Souland*, 9 Mo. 581.

tion."¹⁴ And the principle was authoritatively determined by the Supreme Court of the United States in 1835, when Mr. Justice Story declared: "We are of opinion that the circuit court was bound to take judicial notice of the laws of Louisiana. The circuit courts of the United States are created by Congress, not for the purpose of administering the local laws of a single State alone, but to administer the laws of all the States in the Union to which they respectively apply. The judicial power conferred on the general government by the Constitution extends to many cases arising under the laws of the different States, and this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of, and administer the jurisprudence of all the States. That jurisprudence is then, in no just sense, foreign jurisprudence, to be proved to the courts of the United States by the ordinary modes of proof by which the laws of a foreign country are to be established, but is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts."¹⁵

In the second place, we notice that the courts will not take judicial notice of the laws of foreign States.¹⁶ As Lord Langdale said in England: "With foreign laws an English judge can not be familiar; there are many of which he must be totally ignorant; there is in every case of foreign law an absence of all the accurate knowledge and ready associations which assist him in the consideration of that which is the English law."¹⁷ And as Mr. Chief Justice Marshall said in this country: "The laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts."¹⁸ Neither will the courts of one State take judicial notice of the laws of any other State; and this upon the theory

that the separate States, which together constitute the nation, are, as respects their political relations to each other, essentially foreign countries, whose laws must be proven as facts.¹⁹ But it was held in Vermont, at an early day, that the courts would take judicial notice of the laws of sister States.²⁰ But that doctrine has been overruled in subsequent cases in the same court.²¹ In an early case in New Jersey, a similar doctrine was intimated,²² but the *dicta* in that case have also been overruled in later cases.²³ A similar theory was taken at an early day in Tennessee, and has ever since been maintained in that State.²⁴ And now, under the Code of the State, the Supreme Court takes judicial notice of all foreign laws and statutes.²⁵ In a recent case in Rhode Island, the court took judicial notice of a law of the State of New York.²⁶ In a case in Pennsylvania it was held that a State court, when its judgment would be liable to review by the Supreme Court of the United States in a case arising under the law of a sister State, would take judicial notice of such law.²⁷ "A judgment of this court," so runs the opinion, "arising out of the Federal Constitution and legislation, would be reviewable in the Supreme Court of the United States, and there the States of the Confederacy are not regarded as foreign States whose laws and usages must be proved, but as domestic institutions, whose laws are to be noticed without pleading or proof. It would be an imperfect and dis-

¹⁹ *Drake v. Glover*, 30 Ala. 382; *Mobile R. Co. v. Whitney*, 39 Ala. 468; *Forsyth v. Preer*, 62 Ala. 443; *Newton v. Cocks*, 10 Ark. 169; *Hempstead v. Reed*, 6 Conn. 480; *Brackett v. Norton*, 4 Conn. 517; *Dyer v. Smith*, 12 Conn. 384; *Bailey v. McDowell*, 2 Harrington, 34; *Stanford v. Pruet*, 27 Ga. 243; *Mason v. Wash, Breese*, 39; *Irving v. McLean*, 4 Blackf. 52; *Davis v. Rogers*, 14 Ind. 424; *Johnson v. Chambers*, 12 Ind. 112; *Carey v. Cincinnati, etc. R. Co.*, 5 Iowa, 357; *Taylor v. Runyan*, 9 Iowa, 522; *Shed v. Augustine*, 14 Kan. 282; *Tyler v. Trabue*, 8 B. Mon. 306; *Syme v. Stewart*, 17 La. Ann. 73; *Legg v. Legg*, 8 Mass. 99; *Hoyt v. McNeil*, 13 Minn. 390; *Babcock v. Babcock*, 46 Mo. 243; *Ball v. Consolidated, etc. Co.*, 32 N. Y. Law, 102, 104; *Anderson v. Anderson*, 23 Texas, 639.

²⁰ *Middlebury Coll. v. Cheney*, 1 Vt. 348.

²¹ *Ferritt v. Woodruff*, 19 Vt. 182; *Woodrow v. O'Connor*, 28 Vt. 776.

²² *Curtis v. Martin*, 1 Pennington, (N. J.) 290.

²³ *Van Buskirk v. Mulock*, 3 Harrison, 184.

²⁴ *Foster v. Taylor*, 2 Overton, 191; *Coffee v. Neely*, 2 Heisk. 311; *Hobbs v. Railroad Co.*, 9 Heisk. 873.

²⁵ *Hobbs v. Memphis, etc. R. Co.* 56 Tenn. 874.

²⁶ *Paine v. Schenectady Ins. Co.*, 11 R. I. 411.

²⁷ *State v. Hinchman*, 27 Pa. St. 479.

¹⁴ *United States v. Turner*, 11 How. 663, 668.

¹⁵ *Owings v. Hull*, 9 Pet. 507.

¹⁶ *Freemoult v. Dedre*, 1 P. Wms. 480; *Feaubert v. Turst*, Proc. Ch. 207; *Mostyn v. Farrigas*, Cowp. 174; *Male v. Roberts*, 3 Esp. 163; *Smith v. Gould*, 4 Moore P. C. 21; *Strothen v. Lucas*, 6 Pet. 763; *Armstrong v. Fear*, 8 Pet. 52; *United States v. Wiggins*, 14 Pet. 335; *Dames v. Hale*, 1 Otto, 13; *Bowditch v. Soltyk*, 99 Mass. 138; *Owen v. Boyle*, 15 Me. 147; *Hosford v. Nichols*, 1 Paige, 220; *McCraney v. Alden*, 46 Barb. 274.

¹⁷ *Nelson v. Bridport*, 8 Beav. 527.

¹⁸ *Talbot v. Seeman*, 1 Cranch, 38.

cordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was controlled by another; and hence it follows that in a question of this sort we should take notice of the local laws of a sister State in the same manner as the Supreme Court of the United States would do on a writ of error to a judgment." This case has been severely criticised in Wisconsin.²⁸ In Kansas it has been held that the Constitutions of sister States will be judicially noticed.²⁹ And it has been held in the Supreme Court of the United States that, where a State recognizes acts done in pursuance of the laws of another State, the courts of the first State should take judicial cognizance of the said laws so far as may be necessary to judge of the acts alleged to be done under them.³⁰ A distinction is taken between the written and the unwritten law, and, while the latter may be proven by the testimony of experts, the former can only be shown by the production of the written law itself, duly authenticated. The unwritten law may be proven by parol,³¹ while the written law must be produced.³² In an early case, Mr. Chief Justice Marshall said: "That no testimony shall be received which presupposes better testimony attainable by the party who offers it, applies to foreign law as it does to all other facts."³³ Upon this principle the statute itself must be regarded as better evidence of what it contains, than is the testimony of any individual who, though he may know the general purport of the law, may not carry in his mind so minute and exact a knowledge thereof as is often necessary for

its proper application. In reference to this distinction between the written and unwritten law as to modes of proof, it is important to observe that the courts have held that, in the absence of evidence to the contrary, it will be presumed that the foreign law is unwritten, and that parol evidence will be received upon this assumption.³⁴

While the general rule excludes, in this country, the testimony of witnesses as to the written or statutory law, yet such testimony has been received when the question was, not so much as to the language of the written law, but as to what was the law altogether as shown by its exposition, interpretation and adjudication. In admitting such testimony in Alabama as to the law of Louisiana, the court said: "The exposition, interpretation and adjudication may never have been evidenced by books or writings; but may, nevertheless, have become well understood, as the rule of law deduced by the court from the written words of the Code upon a particular state of facts. Upon such a question, the testimony or opinions of competent witnesses, instructed in the law of that State, may be resorted to."³⁵ In another case it is held that while the statute of a foreign State can not be proved by parol, yet the construction given to such statutes by the tribunals where they are in force, may be given in evidence by witnesses learned in such laws.³⁶ And the Supreme Court of Rhode Island has recently permitted a Spaniard, formerly of Havana, to testify that a verbal partnership was valid under the laws of Cuba; that he might state the written law without producing it.³⁷ The court declared that, in the case of the Spanish colonies, it was difficult to ascertain what their law was without the aid of an expert, their law being composed partly of the various codes of Spain, and partly of the various decrees contained in the *Recopilacion de Indias*, and the various decrees of later date. In the course of its decision the court say: "There are many cases where the evidence of a professional person, or one skilled *virtute officii*, may be much more satisfactory evidence of what the law is, than the mere

²⁸ *Rape v. Heaton*, 9 Wis. 328.

²⁹ *Butcher v. Bank*, 2 Kan. 70; *Dodge v. Coffin*, 15 Kan. 277.

³⁰ *Carpenter v. Dexter*, 8 Wall. 513.

³¹ *Baltimore, etc. R. Co. v. Glenn*, 28 Md. 287; *Herbert v. Myers*, 5 Ind. 94; *People v. Lambert*, 5 Mich. 349; *Merritt v. Merritt*, 20 Ill. 65; *Ennis v. Smith*, 14 How. (U. S.) 400, 426; *McRae v. Mattoon*, 13 Pick. 53; *Owen v. Boyle*, 15 Me. 147, 151; *Tyler v. Trabue*, 8 B. Mon. 306.

³² *Zimmerman v. Hesler*, 32 Md. 274; *Kermott v. Ayer*, 11 Mich. 181; *Woodbridge v. Austin*, 2 Tyler, 364; *Danforth v. Reynolds*, 1 Vt. 265; *Territt v. Woodruff*, 19 Vt. 184. *McNeill v. Arnold*, 17 Ark. 154, 167; *Bowles v. Eddy*, 33 Ark. 645; *Emery v. Berry*, 8 Foster, 473; *Compere v. Jernegan*, 5 Blackf. 375; *Hoes v. Van Alstyne*, 20 Ill. 202; *McDeed v. McDeed*, 67 Ill. 645; *Lee v. Matthews*, 10 Ala. 682; *Ennis v. Smith*, 15 How. 400; *Spaulding v. Vincent*, 24 Vt. 501, 505; *Isabella v. Pecot*, 2 La. Ann. 387; *Bryant v. Kelton*, 1 Tex. 434.

³³ *Church v. Hubbard*, 2 Cranch, 187.

³⁴ *Dougherty v. Snyder*, 15 S. & R. 84, 87; *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, 280.

³⁵ *Walker v. Forbes*, 31 Ala. 9.

³⁶ *Hoes v. Van Alstyne*, 20 Ill. 202.

³⁷ *Barrows v. Downs*, 9 R. I. 453.

exemplification of the exact words of a foreign statute, which the court may not have the necessary knowledge to construe. And it seems to us that the requiring an exemplified copy is pressing the rule of requiring the best evidence to an extent that would often defeat the ends of justice." Chancellor Kent, in an early case, also permitted a Spanish lawyer to testify that a will was executed according to the laws of Cuba, without the production of the written law.³⁸ And recently, in Pennsylvania, a witness was permitted to testify as to the laws of Baden, though his testimony involved a statute.³⁹ So, in a late case in Maryland, a New York lawyer was held competent to testify, in the absence of opposing proof, whether a sale made by a receiver was made after due public notice and advertisement as required by the laws of New York.⁴⁰ In other cases, too, in this country, experts have been allowed to testify as to the law of another State, where a statute and its construction has been involved.⁴¹ But in England the rule is well settled, and has been since 1845, that parol testimony may be received as to foreign law, even though the law be written. Law is considered as a complex resultant of the written law and its interpretation and construction. In *Baron De Bode's case*,⁴² Lord Chief Justice Denman said: "There is another general rule; that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men, and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effect and the state of the law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law. The witness is called upon to state what law does result from the evidence." The same principle is laid down in *Earl Nelson v. Lord Bridport*,⁴³

where the court declares that, although the written law is produced, and due proof made that it has not been repealed, varied or fallen into disuse, and that the words have been accurately translated, "still the words require due construction, and the construction depends on the meaning of the words to be considered with reference to other words not contained in the mere text of the law, and also with reference to the subject-matter, which is not insulated from all others. The construction may have been, probably has been, the subject of judicial decision; instead of one decision, there may have been a long succession of decisions, varying more or less from each other, and ultimately ending in that which alone ought to be applied in the particular case." As Lord Brougham said in the *Sussex Peerage Case*,⁴⁴ "it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House (of Lords) has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it."

When it is desired to prove the language of the written law by the production of the statute, it is evidently necessary that the statute should be authenticated or verified in some manner. In most of the States provision has been made by statute, and books purporting to contain the laws of a sister State, and to be published by authority of such State, may be received as *prima facie* evidence of the laws of such State.⁴⁵ And such books have been received in the absence of any statute authorizing it. One of the earliest reported cases on this subject is that of *Thompson v. Musser*,⁴⁶ in which the right to use such a book as evidence of the law was sustained. "I admit," said McKean, C. J., "that this printed copy of an act of assembly, though it purports to have been printed by the law

⁴⁴ 11 Cl. & F. 85, 115.

⁴⁵ See *Inge v. Murphy*, 10 Ala. 885; *Hanrick v. Andrews*, 9 Porter, 9; *Allen v. Watson*, 2 Hill (S. C.), 319; *Simms v. Southern Express Co.*, 38 Ga. 129; *People v. Calder*, 30 Mich. 85; *People v. Lambert*, 5 Mich. 349; *Whitesides v. Poole*, 9 Rich. 68; *McDeed v. McDeed*, 67 Ill. 545; *Taylor v. Bank of Illinois*, 7 Mon. 585; *Taylor's Adm'r v. Bank*, 5 Leigh, 471; *Vaughn v. Griffith*, 16 Ind. 353; *Paine v. Lake Erie, etc. R. Co.*, 31 Ind. 283; *Merrifield v. Robbins*, 8 Gray, 150.

⁴⁶ 1 Dallas, 458.

³⁸ In the matter of *Robert's Will*, 8 Palge, 446.

³⁹ *Am. Life Ins., etc. Co. v. Rosenagle*, 27 P. F. Smith, 507.

⁴⁰ *Consolidated Real Estate and Fire Ins. Co. v. Cashow*, 41 Md. 59.

⁴¹ *Hooper v. Moore*, 5 Jones Law (N. C.), 130; *Barkman v. Hopkins*, 6 Eng. (Ark.) 157.

⁴² 8 Ad. & Ellis (N. S.), 208.

⁴³ 8 Beav. 527.

printers of Virginia, is not as good evidence as a sworn copy compared with the rolls or an exemplification under the great seal, but these modes of authentication are likewise inferior to the original law itself. If the plaintiff in error had been sued in Virginia, this printed book of the acts of assembly would then, unquestionably, have been good evidence; and I can discover no satisfactory reason why, as he is sued here, the same evidence should not be received at least *prima facie*." This case was decided in 1789, two years prior to the passage of the act of Congress providing for the authentication of records.⁴⁷ But since that act, the same doctrine has been maintained, and in the face of the objection that laws should be authenticated in the manner provided for in that act.⁴⁸ And a volume of laws of a foreign government, transmitted by that government to the Supreme Court of the United States, will be admitted as evidence of the laws of such government, in the courts of the United States, without further authentication.⁴⁹

HENRY WADE ROGERS.

⁴⁷ Rev. Statutes of U. S. (1878) sec. 905.

⁴⁸ *Kean v. Rice*, 12 S. & R. 203; *Raynham v. Canton*, 3 Pick. 293; *State v. Stade*, 1 D. Chipm. 303; *Danforth v. Reynolds*, 1 Vt. 265; *State v. Abbey*, 29 Vt. 60; *Cox v. Robinson*, 2 Stew. & P. 91; *Poindexter's Exr's v. Barker*, 2 Hayw. 173; *Hanrick v. Andrews*, 9 Porter, 9; *Mullen v. Morris*, 2 Pa. St. 85; *Young v. Bank of Alexandria*, 4 Cranch, 388; *Biddis v. James*, 6 Binney, 321, 327. *Per contra*, *Packard v. Hill*, 2 Wend. 411; *Lincoln v. Battelle*, 6 Wend. 475; *State v. Twitty*, 2 Hawks, 441. See, too, *Kinney v. Hosea*, 3 Harr. (Del.) 78.

⁴⁹ *Dauphin v. United States*, 6 Ct. of Claims, 321; *Rothschild v. United States*, 6 Ct. of Claims, 204.

VOLUNTARY ASSIGNMENT — ESCROW — DELIVERY — ESTOPPEL — PLEADING — ALTERATION.

ROBBINS v. MAGEE.

Supreme Court of Indiana, November 29, 1881.

Where a grantor, by an ordinary warranty deed, without conditions or limitations therein expressed, conveys land to certain grantees named in the deed, without using language indicating that they take as trustees, but at the same time executes an agreement with the grantees which shows that they take as trustees, and as such are to sell the land and apply the proceeds to the payment of the grantor's creditors, the transaction must be regarded as a composition agreement between the grantor and his creditors, and not as a voluntary assignment.

2. Where a deed is placed in the hands of a third party, to be delivered only upon condition, and such party, before compliance with said condition, wrongfully delivers the same, the delivery is without force, and passes no title to the grantees in the deed, and the grantor may assail and overthrow it.

3. To constitute a valid estoppel by conduct, there must be knowledge on the part of the party sought to be estopped, and a want of knowledge on the part of the party relying upon the estoppel.

4. An answer which attempts to plead an estoppel by conduct, must show that the defendant relied upon the plaintiff's representations or conduct, was influenced thereby, and was ignorant of the truth. In pleading an estoppel, the facts must be stated with fullness and certainty.

5. No affirmative defense can be maintained upon a deed which has been fraudulently altered by the party who made the alteration.

6. But one who purchases in good faith from such grantee, without knowledge of the alteration of the deed, and acting upon representations of the grantor in the altered deed, obtains a good title.

Appeal from the Rush Circuit Court.

Adams & Michener, B. F. Love, C. Cambeon and Sluth & Study, for appellant; *Miller & Gavin, C. & J. K. Ewing and W. B. Wilson*, for appellees.

ELLIOTT, C. J., delivered the opinion of the court:

This action was commenced by the appellants in the Decatur Circuit Court, and the venue afterwards changed to the Rush Circuit Court.

The complaint of the appellants was in four paragraphs. In the first paragraph it was alleged, that the appellant was the owner of certain real estate on the 17th of December, 1871, and of a large amount of personal property; that, on that day, he executed a deed of assignment to Ralph Magee for said real estate, for the benefit of his, appellant's, creditors; that, at the same time, a written agreement was executed by appellant and the appellees; that at the time of said assignment, the appellant was in failing circumstances, and largely indebted to other persons, not parties to the aforesaid agreement, nor included within the list of creditors in the said assignment, and that the said assignment was made under the act concerning voluntary assignments, approved March 5th, 1859. Copies of the deed of assignment and of the agreement executed contemporaneously with it, are set forth. It is charged that the assignment was invalid for the following reasons: It was not made for the benefit of all of the creditors of the assignor; it was not accompanied by a schedule containing a particular enumeration of all the personal property assigned; the schedule was not sworn to before an officer authorized to administer oaths, as required by the act aforesaid; that the deed was not properly acknowledged; that the deed was not recorded according to law, and that the trustees did not take the oath required by statute. The second paragraph alleges, in substance, that the deed of assignment was delivered as an escrow to one Scobey, to be